Feb 28 2000

(23)

No. 99-699

Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA, *et al.*,

Petitioners,

---- v. ----

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF OF *AMICI CURIAE* FAMILY DEFENSE COUNCIL AND MARY CUMMINS IN SUPPORT OF PETITIONERS

William E. Fay III
25 Broadway (7th Floor)
New York, New York 10004
(212) 509-8999

17pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *iii*

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. DALE'S HOMOSEXUAL ACTIVITY WAS AN OBVIOUS VIOLATION OF THE BOY SCOUT MORAL CODE. 3

II. GIVEN DALE'S DEFIANCE OF THEIR MORAL CODE, PETITIONERS HAD A CLEAR CONSTITUTIONAL RIGHT TO DISMISS HIM AS AN ASSISTANT SCOUTMASTER. 5

A. The First and Fourteenth Amendments guarantee the Scouts the right to limit their membership to persons who are truly loyal to their principles. 5

B. The First and Fourteenth Amendments also grant the Scouts the right to shun any entanglement that would hinder their efforts to persuade boys to comply with their moral code. 6

Page

III. GIVEN THE GRAVE MEDICAL DANGERS INVOLVED IN SEX BETWEEN MALES, THERE IS NO COMPELLING INTEREST THAT WOULD JUSTIFY A LAW REQUIRING THE SCOUTS TO LET ACTIVE HOMOSEXUALS SERVE AS TROOP LEADERS. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Bates v. Little Rock,
361 U.S. 516 (1960) 5

Board of Dirs. of Rotary Int'l v. Rotary Club,
481 U.S. 537 (1987) 7

Dale v. Boy Scouts of America and Monmouth Council, Boy Scouts of America,
160 N.J. 562, 734 A.2d 1196 (Sup. Ct. 1999) ..... *passim*

Democratic Party of U.S. v. Wisconsin,
450 U.S. 107 (1981) 2, 5, 10

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
515 U.S. 557 (1995) 2, 6, 7, 10

Mount Diablo Council of Boy Scouts of America v. Curran,
468 U.S. 1205 (1984) 4

NAACP v. Alabama,
357 U.S. 449 (1958) 5

NAACP v. Button,
371 U.S. 415 (1963) 5

Page

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 7

Ratchford v. Gay Lib, 434 U.S. 1080 (1978) 4

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 5, 7

Constitutional Provisions and Statutes

U.S. Constitution, First Amendment ..... *passim*

U.S. Constitution, Fourteenth Amendment ..... *passim*

N.J.S.A. 10:5-1 to 10:5-49 2

Other Authorities

AMA Council on Scientific Affairs, "Health care needs of gay men and lesbians in the United States", *Journal of the American Medical Association*, May 1, 1996 10

Condoms and Sexually Transmitted Diseases ... Especially AIDS, U.S. Food and Drug Administration, Publication FDA 90-4239, November 1999 8-9

Page

Scott D. Holmberg, MD, MPH, "The Estimated Prevalence and Incidence of HIV in 96 Large US Metropolitan Areas", *American Journal of Public Health*, May 1996 9

Merriam-Webster's Collegiate Dictionary, Tenth Edition (1999) 4

John M. Karon, Ph.D., et al., "Prevalence of HIV Infection in the United States, 1984 to 1992", *Journal of the American Medical Association*, July 10, 1996 9

New York State Department of Health HIV/AIDS Quarterly Update, September 30, 1999 9

Gary Remafedi, MD, MPH, et al., "Demography of Sexual Orientation Among Adolescents", *Pediatrics*, April 1992 9

Roget's International Thesaurus, Fifth Edition (1992) 4

INTEREST OF *AMICI CURIAE**

The Family Defense Council ("FDC") is a nonsectarian, not-for-profit organization dedicated to protecting the rights of parents to bring up their children in accordance with traditional moral principles.

Mrs. Mary Cummins is an FDC director who won a notable victory for those rights back in 1992, when she led a successful fight to prevent New York City's Public Schools Chancellor from forcing local elementary schools to use a so-called "Rainbow Curriculum" that insisted that first grade students "must be taught to acknowledge" that homosexual and lesbian relationships have "positive aspects".

FDC and Mrs. Cummins view the New Jersey Supreme Court's decision in this case with grave concern because they believe it deprives Petitioners of their constitutional right to carry out their Boy Scout programs in accordance with their own convictions as to the best way to promote their members' moral and physical well-being. Not only that, it also defeats the expectations of literally millions of parents who have encouraged their sons to become Scouts because they share those convictions.

---

* Consents by all parties to the filing of this brief have been filed with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief Citations to the opinion below will consist of the prefix "Op." followed by page numbers keyed to the official report, *Dale v. Boy Scouts of America and Monmouth Council,Boy Scouts of America*, 160 N.J. 562 (Sup. Ct. 1999).

SUMMARY OF ARGUMENT

For purposes of this proceeding, FDC and Mrs. Cummins do not deem it worthwhile to debate the lower court's interpretation of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 to 10:5-49). However, they do challenge the lower court's ruling that the First and Fourteenth Amendments allow New Jersey to use that statute to compel Petitioners to reinstate an Assistant Scoutmaster named James Dale, who was expelled from the Boy Scouts because he was an avowed homosexual.

The court below found that Dale's decision to engage in homosexual activity and eventually tell a newspaper reporter about it did not clash with any settled Boy Scout policy (Op. 612-615). However, that finding stands reality on its head. The fact is that what Dale did and said put him in defiance of the long-established Boy Scout principle that every Scout must keep himself "morally straight".

Thus, compelling Dale's reinstatement would violate the Boy Scouts' right to limit their membership to persons who truly share Boy Scout principles, *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981), and to shun any entanglement that would undercut their efforts to promote those principles. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

Moreover, it is incontrovertible that sex between males involves extremely serious medical dangers. Given those dangers, there is clearly no compelling government interest that would justify forcing Petitioners to let an active homosexual like Dale serve as a role model for young Scouts.

ARGUMENT

I. DALE'S HOMOSEXUAL ACTIVITY WAS AN OBVIOUS VIOLATION OF THE BOY SCOUT MORAL CODE.

It is undisputed that the "guiding principles" of Boy Scouting are set forth in a Scout Oath which requires every Scout to keep himself "physically strong ... and morally straight" and a Scout Law which requires every Scout to keep himself "clean" by keeping "his body and mind fit and clean" (Op. 574). It is likewise undisputed that these guiding principles apply to adults who serve in Boy Scout leadership roles (Op. 577).

However, the court below concluded that Dale's avowed homosexual activity did not actually violate these guiding principles because they supposedly "do not ... express anything about sexuality, much less that homosexuality, in particular, is immoral." (Op. 614). Indeed, it then went on to suggest that the Scout Oath and Scout Law merely call on each Scout to make up his own mind about how he should live his life (Op. 612-615). It is respectfully submitted that this "anything goes" reading of the Boy Scout code of conduct is absolute nonsense.

The short answer to the lower court's contention that the Boy Scout Oath does not imply any disapproval or prohibition of homosexual activity is that that interpretation of the oath completely disregards the plain dictionary meaning and conventional understanding of the term "morally straight". In

line with firmly-established usage in literature, the media, everyday conversation, and even litigation in this Court,* *Merriam-Webster's Collegiate Dictionary, Tenth Edition (1999)* defines "straight" in its moral or behavioral sense as meaning "heterosexual", and so does *Roget's International Thesaurus, Fifth Edition* (1992) ¶ 75.13.

Moreover, Petitioners have repeatedly made it clear that their requirement that Scouts must keep themselves "morally straight" means that Scouts must not engage in homosexual activity (Op. 579, note 4; 600; 614, note 12; and 643, note 5). Indeed, the Boy Scouts' stance on this issue has been so forthright and so unambiguous that they have been subjected to a barrage of denunciation and litigation by homosexual activists dating all the way back to the 1980's. See, *e.g.*, *Mount Diablo Council of Boy Scouts of America v. Curran*, 468 U.S. 1205 (1984).

Thus, when Dale engaged in sex with other males, he not only violated his Boy Scout Oath, but demonstrated his opposition to a fundamental Boy Scout moral principle. In short, the lower court's "finding" that Dale's homosexual activity was perfectly compatible with Boy Scout moral standards is an obvious absurdity. No matter how strongly the lower court may have felt that the Boy Scouts should adopt moral agnosticism as a guiding principle, it had no right to impose that philosophy on the Boy Scouts by pretending that that's the philosophy they had chosen for themselves.

---

* See *Ratchford v. Gay Lib*, 434 U.S. 1080, 1083 (1978) where the respondent's own Gay Lib manifesto used the word "straight" as a well understood synonym for " heterosexual".

II. GIVEN DALE'S DEFIANCE OF THEIR MORAL CODE, PETITIONERS HAD A CLEAR CONSTITUTIONAL RIGHT TO DISMISS HIM AS AN ASSISTANT SCOUTMASTER.

A. The First and Fourteenth Amendments guarantee the Scouts the right to limit their membership to persons who are truly loyal to their principles.

As this Court has repeatedly recognized, the First and Fourteenth Amendments not only protect the rights of individuals to express themselves freely as individuals, but also protect the rights of like-minded individuals to join together to pursue common goals based on their common convictions. *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Bates v. Little Rock*, 361 U.S. 516, 522-523 (1960); *NAACP v. Alabama*, 357 U.S. 449, 460-461(1958). Moreover, the freedom to form an association carries with it the freedom to limit membership in the association to individuals who truly share its principles.

Accordingly, this Court has held that national political parties have a constitutionally protected right to adopt and enforce rules designed to screen out would-be nominating convention delegates whose dedication to party principles is "slight, tenuous, or fleeting". *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 123 (1981).

In the case at bar, the record establishes that Dale is not merely lukewarm about complying with the Boy Scouts' moral standards, but is deliberately flouting them. This key fact clearly distinguishes this case from *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), where it was held that a

state could require a previously all-male national organization to accept women as members because there was no perceptible clash between the views or conduct of the prospective women members and the goals or principles of the organization.

That being so, Petitioners had a clear constitutional right to expel Dale from the Scouts and dismiss him as an Assistant Scoutmaster, and the lower court's decision requiring Dale's reinstatement should therefore be reversed.

B. The First and Fourteenth Amendments also grant the Scouts the right to shun any entanglement that would hinder their efforts to persuade boys to comply with their moral code.

Requiring Petitioners to reinstate Dale despite his avowed homosexual activity would violate Petitioners' First and Fourteenth Amendment free speech rights under the principles laid down in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that Massachusetts law may not compel the sponsors of Boston's annual St. Patrick's Day Parade to let homosexuals and lesbians march in the parade under their own banner because this would deprive the sponsors of their right to select the messages to be conveyed by their parade).

Indeed, compelling Dale's reinstatement would be an even graver free speech infringement than the one condemned in *Hurley* because it would make an absolute mockery of one of Petitioners' most solemn statements of principle, namely, the Scout Oath requiring every Scout to keep himself "morally straight".

Given Dale's violation of his Scout Oath by engaging in sex with males, who would take that guiding Boy Scout moral principle seriously if Dale were not only reinstated as a Scout but also reinstated as an Assistant Scoutmaster? The question answers itself. Petitioners could take out daily full page newspaper ads proclaiming that the Boy Scouts disapprove of homosexual activity, but no one would give those ads the slightest credence. The fact that would speak most loudly to young Scouts and the public at large would be that Dale's reinstatement demonstrated that there is no real Boy Scout taboo against homosexual activity.

Thus, the case at bar bears no resemblance to the three "expressive association" cases relied on by the court below, *i.e.*, *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); and *Roberts v. United States Jaycees, supra*. Unlike Petitioners, none of the organizations involved in those cases made any showing that an anti-discrimination law was being used to force it to grant membership to persons whose presence within the organization would undercut its ability to get its message across to its desired audience.

Here, reinstatement of Dale would cripple Petitioners' efforts to communicate their guiding principles in a manner that would be persuasive to existing or prospective Scouts or the general public. Moreover, Petitioners would have to endure this burden day in and day out for as long as Dale chose to inflict himself on them, a much more devastating free speech infringement than the one day a year imposition struck down in *Hurley*. Accordingly, the lower court's decision requiring Dale's reinstatement violates Petitioners' First and Fourteenth Amendment rights to freedom of speech and should therefore be reversed.

III. GIVEN THE GRAVE MEDICAL DANGERS INVOLVED IN SEX BETWEEN MALES, THERE IS NO COMPELLING INTEREST THAT WOULD JUSTIFY A LAW REQUIRING THE SCOUTS TO LET ACTIVE HOMOSEXUALS SERVE AS TROOP LEADERS.

Although the lower court appears to have recognized that it had no right to mandate Dale's reinstatement in the absence of some compelling government interest that would justify that sort of intrusion on Petitioners' freedom to select their own troop leaders (Op. 612, citing *Roberts, supra*), it never bothered to demonstrate the existence of such a compelling interest. Instead, it simply assumed that a generalized legislative desire to protect homosexuals against discrimination provided a sufficient justification for ordering Petitioners to let an active homosexual serve as a role model for young Scouts.

In so doing, it not only gave short shrift to the provisions of Petitioners' code of conduct aimed at keeping Scouts "physically strong" and bodily "fit", but also turned a blind eye to a mountain of scientific evidence that the type of sexual activity engaged in and defended by would-be role models such as Dale involves medical dangers every bit as serious as those involved in drug abuse.

Specifically, study after study shows that "Anal intercourse is very risky because it can cause tissue in the rectum to tear and bleed. These tears allow disease germs to pass more easily from one partner to another." *Condoms and Sexually Transmitted Diseases ... Especially AIDS*, U.S. Food and Drug Administration, Publication FDA 90-4239, November 1999, page 7. In addition, anal intercourse

is so stressful that it produces a great many more condom failures than vaginal intercourse. Accordingly, the U.S. Surgeon General has warned that "anal intercourse is simply too dangerous to practice" even with a condom. *Ibid.* Despite this warning, most homosexuals still engage in anal intercourse with the following appalling results.

Males who have sex with males account for over half of all HIV infections in the United States, the mid-range estimate being approximately 450,000 cases out of a total of 750,000. John M. Karon, Ph.D., et al., "Prevalence of HIV Infection in the United States, 1984 to 1992", *Journal of the American Medical Association*, July 10, 1996, Table 4.

Estimated HIV infection rates for homosexuals in large U.S. cities range from 11.9% in Baltimore to 13.8% in Detroit, 14.1% in Seattle, 16.3% in Chicago, 17.9% in Newark, 21% in Philadelphia, 22.6% in Los Angeles, 24.2% in the District of Columbia, 26.6% in Dallas, 27.1% in Houston, 28.6% in Atlanta, 29.2% in New York, 31.4% in Miami and 40.7% in San Francisco. Scott D. Holmberg, MD, MPH, "The Estimated Prevalence and Incidence of HIV in 96 Large US Metropolitan Areas", *American Journal of Public Health*, May 1996, Table 1, pages 646-647.

Even though fewer than 2% of 12 to 18 year old boys have engaged in any form of homosexual activity (Gary Remafedi, MD, MPH, et al., "Demography of Sexual Orientation Among Adolescents", *Pediatrics*, April 1992, p. 719), sex between males accounts for over one third of all AIDS cases diagnosed in teenage New York City boys since 1981. New York State Department of Health HIV/AIDS Quarterly Update, September 30, 1999, Table 4B.

To make matters worse, males who have sex with males are also at extremely high risk for hepatitis B, proctitis, enteritis, colitis and anal syphilis. AMA Council on Scientific Affairs, "Health care needs of gay men and lesbians in the United States", *Journal of the American Medical Association*, May 1, 1996, pages 1356-1357.

Given these grim medical realities, it has to be concluded that there cannot possibly be any compelling government interest that would justify forcing the Boy Scouts to provide role model opportunities for men like Dale who engage in or defend high risk homosexual activity.

CONCLUSION

The central fact in this case is that the Boy Scouts' guiding principles require every Boy Scout to keep himself "morally straight" and "clean". Contrary to the view taken by the court below, these requirements are not mere empty abstractions that permit every Scout to make up his own mind about how to live his life. Quite clearly, they put the Boy Scouts on record as disapproving homosexual activity because it is just as immoral as drug abuse.

That being so, Dale's avowed homosexual activity fully justified Petitioners' decision to expel him from the Scouts and remove him from his position as an Assistant Scoutmaster.

Under this Court's holdings in *Hurley* and *Democratic Party of U.S. v. Wisconsin*, *supra*, the lower court's decision requiring Petitioners to reinstate Dale despite his defiance of the Boy Scouts' code of conduct plainly violated Petitioners'

First and Fourteenth Amendment rights to free speech and freedom of association. Not only that, it also violated the constitutional principle that legislatures and courts have no authority to interfere with a non-governmental organization's right to select its own members and leaders unless such interference serves a compelling government interest.

Accordingly, the decision should be reversed so that Petitioners and similar youth groups will be free to carry out their programs in accordance with their own convictions as to the best way to promote the moral and physical well-being of their members. No matter how strongly some courts or legislatures may disagree with such convictions, they have no right to use anti-discrimination laws as a way to subvert them.

Respectfully submitted,

William E. Fay III
Attorney for *Amici*
Family Defense Council
and Mary Cummins
25 Broadway (7th Floor)
New York, New York 10004
(212) 509-8999

Of counsel: John D. Hartigan
165 East 66th Street #3D
New York, New York 10021
(212) 737-0187

Dated: February 24, 2000